

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

NICOLAS TRUJILLO,

Plaintiff,

No. CIV S-04-2368 MCE GGH P

vs.

D. LORUSSO,

Defendant.

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendant's motion for summary judgment filed November 22, 2005.

Plaintiff has not filed an opposition to defendant's motion. In the order directing service filed December 10, 2004, the court stated that "[i]f plaintiff does not serve and file a written opposition to the motion or a request to postpone consideration of defendants' motion, the court may consider the failure to act as a waiver of opposition to defendant's motion." See Local Rule 78-230 (m). Defendants' notice of motion also directed plaintiff to Local Rule 78-230 for information regarding summary judgment.

A district court may not grant a motion for summary judgment simply because the nonmoving party does not file opposing material, even if the failure to oppose violates a local

1 rule. Martinez v. Stanford, 323 F.3d 1178 (9th Cir. 2003); Brydges v. Lewis, 18 F.3d 651, 652  
2 (9th Cir. March 9, 1994), citing Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993).  
3 However, when the local rule does not require, but merely permits the court to grant a motion for  
4 summary judgment, the district court has discretion to determine whether noncompliance should  
5 be deemed consent to the motion. Id.

6 In the instant case, plaintiff has been warned that his failure to oppose a motion  
7 for summary judgment may be deemed a waiver of opposition to the motion. Based on  
8 plaintiff's failure to file an opposition, the court concludes that plaintiff has consented to  
9 defendant's motion for summary judgment. In the alternative, the court finds that defendant's  
10 motion has merit.

11 Accordingly, IT IS HEREBY RECOMMENDED that defendant's November 22,  
12 2005, motion for summary judgment be granted.

13 These findings and recommendations are submitted to the United States District  
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
15 days after being served with these findings and recommendations, any party may file written  
16 objections with the court and serve a copy on all parties. Such a document should be captioned  
17 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
18 shall be served and filed within ten days after service of the objections. The parties are advised  
19 that failure to file objections within the specified time may waive the right to appeal the District  
20 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: 2/13/06

22  
23 /s/ Gregory G. Hollows

24 UNITED STATES MAGISTRATE JUDGE

25 GGH:035  
26 truj2368.46